

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS: 05-0523  
USE TAX  
FOR TAX YEARS 2003-2004**

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**ISSUE**

**I. Use Tax: Collection Letters**

**Authority:** IC 6-8.1-5-1(b); IC 6-2.5-1-1; IC 6-2.5-1-2; IC 6-2.5-4-1; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; Cowden & Sons Trucking, Inc. v. Indiana Dep't of Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991); Chrome Deposit Corporation v. Indiana Dep't of Revenue, 557 N.E.2d 1110 (Ind. Tax Ct. 1990), aff'd, 578 N.E.2d 643 (Ind. 1991); Galligan v. Indiana Dep't of Revenue, 825 N.E. 2d 467, 481 (Ind. Tax Ct. 2005); Commissioner's Directive Number 21 (January 2004).

Taxpayer protests the assessment of use tax on purchases of collection letters made from an out of state company.

**STATEMENT OF FACTS**

Taxpayer is an Indiana collection agency that collects delinquent accounts receivables from patients of various healthcare providers. The taxpayer utilizes a combination of standardized mailings and telephoning techniques to make collections. To produce its monthly letters, the taxpayer sends self-composed text and its database of accounts receivable to an out of state company ("Company") via the internet. The Company produces and mails a specified quantity of custom letters to ninety-nine percent (99%) of taxpayer's Indiana addresses. On a monthly basis, the Company bills the taxpayer and itemizes its invoices by quantities multiplied by units of product types. The Indiana Department of Revenue ("Department") conducted an audit review and assessed use tax on the taxpayer's purchases from the Company. The taxpayer submitted a protest challenging the assessment. The Department held a hearing and now presents this Letter of Findings with additional facts to follow.

**DISCUSSION**

**I. Use Tax: Collection Letters**

The audit review viewed the taxpayer's purchase of collection letters as part of a retail unitary transaction and subject to use tax under the provisions of 45 IAC 2.2-1-1. 45 IAC 2.2-1-1(a) provides:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction....

I.C. 6-2.5-1-2(b) defines a retail unitary transaction as "a unitary transaction that is also a retail transaction." A unitary transaction is "all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." IC 6.2.5-1-1(a). A retail transaction is "a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1...." IC 6-2.5-1-2(a). IC 6-2.5-4-1 states:

- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.
- (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.
- (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
  - (1) the price of the property transferred, without the rendition of any services, and
  - (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records....

The audit review additionally determined that because the cost of delivery was included in the unit cost charged to the taxpayer, the sales and use tax also applied to the delivery charges for the 2004 tax year. Commissioner's Directive Number 21 (January 2004) clarified the IC 6-2.5-4-1 definition of "selling at retail" to include:

delivery charges in gross retail income and charges by the seller for the preparation and delivery of the property to a location designated by the purchaser, including but not limited to transportation, shipping, postage, handling, crating and packing.

Indiana Department of Revenue assessments are prima facie evidence the department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id.

The taxpayer explains in its protest letter that “many transactions involve the exchange of a mix of services and tangible personal property for consideration. These so call[ed] ‘mixed transactions’ are considered transactions of retail merchants selling at retail and are therefore subject to gross retail/use tax.” However, if the transaction satisfies 45 IAC 2.2-4-2(a)(1)-(4), collectively referred to as the “true object” test, the transaction is not subject to gross retail/use taxes. Cowden & Sons Trucking, Inc. v. Indiana Dep’t of Revenue, 575 N.E.2d 718, 724 (Ind. Tax Ct. 1991).

The taxpayer contends its transaction with the Company satisfied the “true object” test for the following reasons: 1) the transaction was with a professional data processing service provider that processed information into custom letters; 2) the paper and reply envelopes were necessary because the Company could not produce the custom letters without consuming paper and envelopes; 3) taking out the cost of paper and envelopes, the items of tangible personal property only accounted for six percent of the total fees charged by the Company and was inconsequential (did not exceed ten percent) compared with the service charge; and 4) the Company paid sales and use tax on the tangible personal property at the time it acquired the property. The taxpayer further contends its transaction is not subject to use tax under the “but for” test. The “but for” test considers the intent of the parties to determine whether a mixed transaction is one for services or for the sales of goods. Chrome Deposit Corporation v. Indiana Dep’t of Revenue, 557 N.E.2d 1110, 1114 (Ind. Tax Ct. 1990), aff’d, 578 N.E.2d 643 (Ind. 1991).

However, based on case law, this is not a persuasive argument. The tax court has previously questioned the validity of regulation 45 IAC 2.2-4-2. Galligan. v. Indiana Dep’t of Revenue, 825 N.E. 2d 467, 480 n.16 (Ind. Tax Ct. 2005). The court in Galligan stated:

Services rendered in retail unitary transactions are taxable only ***if the transfer of the property and the rendition of services are inextricable and indivisible***. See Howland, 790 N.E.2d at 629 (citation omitted). Generally, the transfer of property and the rendition of services are inextricable and indivisible when the services are performed before the property was transferred to the transferee... Services provided after a transfer of property, however, indicate a divisible transaction in which the sale is taxed but the services are not... The Court must look to other factors to determine whether the transaction is inextricable and indivisible, such as the service-provider’s records, the overall nature of its business, as well as the nature of the unitary transactions themselves.... Based on the... evidence... th[e] Court [must] find that [the service provider] ***intended to treat the transfer of property and the provisions of its services separately***...

Id. at 481 (emphasis added). Using this analysis, the determination of whether a mixed transaction is taxable hinges on whether the rendition of the services is inextricable and indivisible. Moreover, the determination of whether a service is inextricable and indivisible involves determining the intent of the service provider.

The audit review was correct to conclude that the taxpayer’s purchases from the Company were part of a retail unitary transaction. The fact that the Company bills the taxpayer by itemizing the invoices by quantities multiplied by the product types, confirms that the Company did not intend to treat the transfer of property and services separately. Moreover, the fact that the Company

supplied information breaking into percentages the component parts of how it billed the taxpayer does not affect the nature or taxability of the original transaction. The majority of the components represent postage and tangible property. Therefore, the audit review correctly treated the purchases as a retail unitary transaction subject to use tax.

**FINDING**

The Department denies the taxpayer's protest.

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